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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF MPOWER COMMUNICATIONS CORP.

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SUMMARY

Initial comments of most ILECs in this proceeding represent the latest initiative of these carriers to establish a regulatory framework that will thwart the development of competition in provision of local telecommunications services, especially advanced services. Thus, most ILECs urge the Commission to adopt a constricted interpretation of their obligation to provide collocation under Section 251(c)(6) and erroneously characterize *GTE v. FCC* as legally precluding physical collocation of any equipment that might facilitate the development of competition. In notable contrast to the other ILECs, Qwest seems to have discovered that there are significant opportunities for ILECs in serving the CLEC wholesale market. Qwest has taken important initial steps to removing artificial legal and regulatory barriers to potentially beneficial relationships between ILECs and CLECs. Qwest recognizes that ILECs should embrace CLECs as valuable new customers, rather than opposed as unwanted intruders into ILEC facilities.

As pointed out by Mpower in initial comments, Section 251(c)(6) provides a solid source of authority that the Commission has barely acknowledged and has yet to exploit. Section 251(c)(6) authorizes the Commission to establish reasonable conditions of collocation, or, conversely, to prohibit certain conditions on provision of collocation that ILECs might seek to impose. Simply stated, once the threshold for collocation is met, *i.e.*, collocation of "necessary" equipment, the FCC has ample authority to require ILECs to permit collocation of some multifunction equipment, or even stand-alone equipment that is unrelated to interconnection or access to UNEs. Similarly, the Commission may require ILECs, as a reasonable condition of providing collocation, to permit CLECs to cross-connect with other CLECs. ILECs simply

ignore this font of authority in Section 251(c)(6) and pretend that they are not required to offer collocation pursuant to reasonable terms and conditions.

The Commission should also reject ILEC requests to delay, or not take at all, the concrete steps that are necessary to assure that ILEC deployment of next generation architectures promotes, rather than thwarts, competition. In essence, most ILECs urge the Commission to adopt positions that would permit them to control the extent and pace of competition in next generation network environments. ILECs seek to extend their bottleneck control to next generation networks. However, as requested by Mpower in its initial comments, the Commission should establish new UNEs consistent with Mpower's white paper that provides a framework for identification of new UNEs in next generation networks. In particular, at this time, the Commission should establish seven new fiber based UNEs as discussed in that white paper. These new fiber UNEs should be designated by the FCC *now* to encourage equipment manufacturers to conduct the advanced planning and make the investment necessary to bring new equipment to market without further delay.

The Commission should reject efforts by some ILECs and some manufacturers in this proceeding to artificially constrain the ability of CLECs to provide the network components that will enable them to provide the full range of competitive services envisioned by the Act. In this connection, Mpower submits that the Commission should accord little weight to the comments of Alcatel, which apparently supports ILEC efforts to extend their monopoly to advanced technology and equipment. As discussed herein, Alcatel's claims of technical infeasibility, such as with respect to CLEC collocation of line cards, are in reality no more than statements that Alcatel prefers that CLECs not collocate line cards. Rather, the Commission should require that

ILECs deploy next generation networks based on open technical standards for all network components, including line cards, that will permit CLECs to purchase them in a fully competitive equipment market and freely install them in next generation networks. The Commission should also require that copper loops be maintained for at least ten years.

Mpower applauds the decision of Qwest to break ranks with other ILECs and advocate positions in a number of important respects, such as collocation of multifunction equipment, that could help achieve the pro-competitive goals of the Act. Qwest's positions undercut those of other ILECs. The Commission should let Qwest speak for ILECs on the sensitive competitive issues raised in this proceeding. In these comments, Mpower points out several areas where Qwest's position differs markedly from other ILECs.

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REPLY COMMENTS OF
MPOWER COMMUNICATIONS CORP.

Mpower Communications Corp. ("Mpower") submits these reply comments in response in the above-captioned proceedings[1] concerning issues raised on remand[2] of the *Collocation Order*[3] and concerning the need for revision of the Commission's local competition rules in light

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1 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297 (August 10, 2000) ("*Collocation Reconsideration Order and NPRM*").

2 *GTE Service Corp v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) ("*GTE v. FCC*").

3 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) ("*Collocation Order*"), *aff'd in part and remanded in part sub. nom. GTE v. FCC, supra.*

of deployment of next generation network architecture by incumbent local exchange carriers ("ILECs").

I. THE COMMISSION MAY, AND SHOULD, REQUIRE COLLOCATION OF A FULL RANGE OF TELECOMMUNICATIONS EQUIPMENT

A. The Commission Has Ample Authority to Require Collocation of Multifunction Equipment

In its initial comments Mpower detailed the extensive power the Commission has to adopt rules prohibiting the incumbents from providing interconnection or access to UNEs in a manner less efficient than that they provide to themselves. Because of the strong anti-discrimination provisions in the 1996 Act, the Commission has the ability to adopt rules that put competitive carriers at parity with the incumbents with respect to the collocation of equipment necessary for interconnection or access to UNEs. Further, Section 251(c)(6) authorizes the Commission to establish reasonable terms and conditions for the provision of collocation. Pursuant to that section, the Commission may require ILECs to permit collocation of multifunction equipment.

With the notable exception of Qwest, in their initial comments the ILECs appear to be oblivious to any obligation they have to offer physical collocation on reasonable and nondiscriminatory terms and conditions. Qwest's decision to break ranks with other ILECs on this issue and to permit collocation of multifunction equipment, however, sheds light on the anticompetitive objectives motivating the other ILECs' intransigence on this issue.[4] If it is reasonable for Qwest to permit collocation of multifunction equipment, it is reasonable for other

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[4] *Qwest Comments* at p. 4.

ILECs as well.

B. ILECs MISREAD *GTE v. FCC* OPINION

Mpower strongly disagrees with the ILECs' interpretation of the requirements of *GTE v. FCC*. USTA, for example, argues that the Commission's call for comment on the meaning of the term "necessary" is misguided because the D.C. Circuit provided sufficient instruction to the Commission. However, the D.C. Circuit remanded the case to the Commission specifically for further reconsideration of the meaning of the term "necessary" by the Commission. In fact, the only sensible reading of the Court's opinion is that while the Court believed that the Commission's interpretation of the term "necessary" as discussed in the *Collocation Order* was overly broad, it expected the Commission to reconsider its rules to give additional meaning to the term "necessary" in light of the Court order. Specifically, the Court held that "the FCC's interpretations of 'necessary' and 'physical collocation' *appear to be* impermissibly broad. We therefore vacate the challenged Collocation Order *insofar as it embraces unduly broad definitions of 'necessary' and 'physical collocation' and remand for further consideration by the FCC.*"[5] While the Court clearly gave the Commission guidance as to what might be an acceptable reading of the term "necessary," it did not mandate the strained meaning or the anticompetitive implementation that some ILECs seek. Again, Qwest's decision to break ranks on this issue validates that "necessary" means necessary for effective competition and that there is no need or justification for adopting an unduly narrow interpretation of that

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[5] *GTE v. FCC*, 205 F.3d at 425 (emphasis added).

term.[6]

ILECs also inaccurately characterize the Court's order as shifting onto the competitors the burden of demonstrating that the equipment they seek to place in an ILEC's central office is equipment that is necessary for interconnection or access to unbundled network elements. For example, Verizon states that "if the competitor can show that the cost of alternative interconnection arrangements is so significant that the competitor would be unable to offer a commercially viable service, or if it can prove that the alternative is technologically inferior and makes the service non-competitive, then the alternative is effectively unavailable."[7] But nowhere in either the statute or the Court's order is there any indication that the burden should be on the competitors to demonstrate that the equipment that they seek to place in the incumbent's central office satisfies any requirements of the statute. In the *Local Competition Order*, the Commission adopted Rule 51.323(b), which requires that "[w]henever an incumbent LEC objects to collocation of equipment by a requesting . . . . carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC must prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements."[8] That rule is in effect today and has not been drawn into question by either the D.C. Circuit or the Commission. Accordingly, the ILECs' challenges are untimely and beyond the scope of this proceeding.

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6 *Qwest Comments* at p. 5.

7 *Verizon Comments* at p. 4.

Perhaps the most glaring ILEC overstatement about the Court's ruling is the argument that the Court's ruling forbids the collocation of "multifunctional" equipment.[9] In fact, the Court did not hold that the Commission could allow only single function equipment. ILECs, other than Qwest, disregard the fact that the Court's discussion of multifunction equipment was tied or "intertwined with" its discussion of the Commission's statement that "necessary" included any equipment that was "used or useful" for interconnection.[10] Had the Court intended to rule that only single function equipment could be collocated, it easily could have done so. The term "single function equipment" or any equivalent is not used in the Court's opinion. And, of course, the Court's primary holding was that, to the extent that the Commission's collocation rules require collocation of equipment that is not "directly related to and thus necessary, required or indispensable to 'interconnection or access to unbundled network elements,'" the Commission's rules "demand a better explanation."[11] Therefore, the Commission need only provide a better explanation as to why collocation of multifunction equipment is "necessary." Mpower submits that all of the reasons provided by Mpower in its initial comments provide such an explanation.

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[8] 47 C.F.R. § 51.323(b).

[9] Verizon argues that "collocated equipment may contain only those features and functions that meet the 'necessary' test, and not features and functions that are unnecessary for that narrow purpose." *Verizon Comments* at p. 2.

[10] *Verizon Comments* at p. 6; *BellSouth Comments* at pp. 2-4; *Qwest Comments* at p. 5.

[11] *GTE v. FCC*, 205 F.3d at 424.

ILECs also argue that the Commission either cannot take cost efficiency into account[12] or can take it into account only if "the cost of alternative interconnection is so significant that the competitor would be unable to offer a commercially viable service."[13] While the Court relied upon the recent Supreme Court decision in *AT&T v. Iowa Utilities Board*, it never indicated that cost efficiency could not be taken into account by the Commission in defining "necessary."[14] Nor did the Supreme Court in *AT&T v. Iowa Utilities Board* indicate that the competitors must demonstrate that the cost of alternatives must be so significant that the competitor could not otherwise provide commercially viable service. Rather the Supreme Court simply stated that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act.".[15] The Supreme Court overturned the Commission's UNE rules only because the Commission had regarded "any increased costs or decreased service quality as establishing a 'necessity' and an 'impair[ment]' of the ability to 'provide . . . service.'"[16]

In short, the Commission should reject ILEC arguments that the term "necessary" limits Section 251(c)(6) to such an extent that collocation must be required only when there is absolutely no other technical alternative or when competitors would have absolutely no other

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12 *SBC Comments* at p. 11; *Verizon Comments* at p. 5 ("[m]ere cost efficiency cannot be a factor in determining whether physical collocation is 'necessary for interconnection or access to unbundled network elements").

13 *Verizon Comments* at p. 4.

14 *GTE v. FCC*, 205 F.3d at 422-24.

15 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999) (emphasis in original).

16 *Id.* at 392.

economically viable alternative for providing service. Neither the Supreme Court nor the D.C. Circuit, nor Congress for that matter, indicated that the competitors would have to show that they would not be able to provide service at all without collocation.

C. Freeing Up Space Does Not Justify Restricted Collocation

Some ILECs advance the argument that the Commission should adopt a very limited definition of "necessary" because such a definition would free up space in incumbent carriers' offices to accommodate the equipment of additional competitors where collocation is "necessary." This argument borders on the absurd. The experience of competitors has been that there are very few, if any, instances where collocation space is in as short supply as ILECs would have the competitors and the Commission believe. In fact, in the vast majority of instances of which Mpower is aware that ILECs have claimed that space is not available, the competitors have found space after a walk through. And, because equipment is becoming smaller,[17] it is likely that concerns regarding space limitations will decrease with time in most central offices.[18] More importantly, the remedy for insufficient collocation space is to build additional space. It

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[17] *See Quest Comments* at p. 11 ("A never pieced equipment might be both multi-function *and* smaller").

[18] Verizon states that: "In a great many cases, . . . space stays empty for years" and argues that the Commission should "make clear that incumbents are free, after reasonable notice, to reclaim and reuse space that a collocator has failed to occupy within a specified period." Verizon asserts that one company routinely orders 400 square feet of space in every central office. Mpower strongly objects to the suggestion that ILECs would be able to supervise CLEC's use of collocation space to this extent. This would provide yet another opportunity for ILECs to discriminate against CLECs. Moreover, the cost of collocation space makes it highly unlikely that collocators are reserving more space than they actually need. Accordingly, there is no need to permit ILECs to cancel CLEC collocation space.

would makes no sense to unduly restrict the ability of CLECs to collocate under the misguided view that this is somehow helping competitors when the remedy of space expansion is readily available.

D. The Commission Should Adopt Rules that Ensure that Any Type of Equipment that ILECs Use Themselves to Provide Interconnection or Access to UNEs May Be Collocated in ILEC Central Offices

While ILECs would have the Commission read section 251(c)(6) as very limited,[19] it is absolutely clear that the Commission must not consider the section in a vacuum or without reference to either the other sections or the purposes of the Act. Mpower will not reiterate all of its initial arguments here, but points out that Section 251(c)(6) requires the incumbents to "provide, on rates, terms and conditions that are just reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements."[20] In interpreting this section the Commission must, at the very least, consider the other portions of Section 251 that address the ILECs' obligations relating to interconnection and access to unbundled network elements. Section 251(c)(2) provides that interconnection must be "at least equal in quality to that provided to the local exchange carrier itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[21] Similarly, Section(c)(3) requires incumbents to provide "nondiscriminatory access to network elements . . .

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[19] Qwest offers a notable exception, arguing that CLECs should be permitted to collocate multifunction equipment in ILEC premises. *Qwest Comments* at pp. 12-14.

[20] 47 U.S.C. § 251(c)(6).

[21] *Id.* at § 251(c)(2).

on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[22] Those sections provide the backdrop in light of which the term "necessary" must be interpreted.

E. The Commission Should Not Compromise the Procompetitive Goal of the Act In An Effort to Avoid A "Takings"

The ILECs continue to suggest that anything but collocation for the most basic form of interconnection would somehow constitute an unnecessary taking of ILEC property.[23] There is no controversy as to whether congress has granted the Commission the authority to impose a limited taking of ILEC property for the purpose of collocation, for undoubtedly it has.[24] However, to the extent that the Act or any of the Commission's collocation rules effect a taking of ILEC property, that does not, by itself, render the action unconstitutional.[25]

In addition, to the extent that the scope of the taking authorized by Congress is unclear, the Commission may infer that congress gave it the amount of authority necessary to effectuate the purpose of the Act.[26] In no event should ILEC concerns regarding the Act's effectuating a

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22 *Id.* at § 251(c)(3).

23 *Verizon Comments* at p. 13.

24 *See* 47 U.S.C. § 251 (c)(6); *see GTE v. FCC*, 205 F.3d at 4119-20 (describing how section 251(c)(6) of the 96 Act altered the "statutory landscape by providing explicit Congressional authorization for physical collocation," thus effectively overturning the Pre-96 Act, case of *BellAltantic Telephone Co. v. FCC*, 24 F.3d at 1441 (D.C. Cir. 1994), which did not allow for physical occupation of LEC central offices.

25 *Gulf Power Co. v. U.S.*, 187 F.3d 1324, 1331 (11th Cir. 1999) (citations omitted) ("All that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking.") *Id.*

26 *See Bell Atlantic*, 24 F.3d at 1446; *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (con't.)

taking override the express congressional will that collocation be made available on "terms [] and conditions that are just, reasonable, and nondiscriminatory."[27] Were the Act to be interpreted as advocated by most of the ILECs, Section 251(c)(6) would be rendered all but meaningless and competitors would be returned to the regulatory landscape as it existed prior to the Act's passage. While this would suit the ILECs, it is not required by the Fifth Amendment and would be contrary to the express terms and purpose of the Act.

Furthermore, the fact that a statute effects a taking of property does not make it impermissible.[28] As the Eleventh Circuit has recently ruled, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[29] ILECs are more than adequately compensated for collocation. As pointed out by Mpower in initial comments, collocation space is among the most expensive real estate in America.[30] Collocation space routinely costs far more than equivalent office space even taking into account some special requirements for central offices. Moreover, ILECs have been accorded more than adequate due process in setting collocation rates given the numerous rulemaking and ratemaking proceedings involving collocation at both the state and federal levels.[31]

Nor is there any basis for the ILECs' concerns that requiring cross connects and the

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(1962).

27 47 U.S.C. § 251(c)(6); *See BellAtlantic*, 24 F.3d at 1446.

28 *Gulf Power v. U.S.*, 187 F.3d at 1331 (citations omitted).

29 *Id.*

30 *Mpower Comments* at p. 24.

collocation of equipment with advanced functions will result in a greater taking of ILEC property than necessary. In fact, the opposite is true. Even Qwest pointed out that in many instances the space required for the contested equipment would be equal to or smaller than the limited set of equipment the ILECs advocate.[32] This indicates that most of the ILECs, with the possible exception of Qwest, are actually concerned not with the physical occupation of their property or the compensation therefore, but rather for the erosion of their monopoly positions in the market. Accordingly, Mpower urges the Commission to reject the ILECs' arguments on this issue.

II. THE COMMISSION SHOULD IMPLEMENT A NATIONAL SPACE RESERVATION POLICY FOR BOTH CENTRAL OFFICE AND REMOTE TERMINAL COLLOCATION

A. The Need for a National Standard

In opposition to the call for a national space reservation plan, the ILECs raise their now-stock opposition to any attempt to implement a national standard, *i.e.*, that the states are in the best position to address this issue and that "a national space reservation policy could not take into account the differences in underlying incumbent networks and systems."[33] The ILECs miss the point, however. The object of a national space reservation policy is not to displace the state's role in issues of collocation space. Instead, states should be permitted to establish state-specific reservation policies that supplement, and are consistent with, federal standards.

CLECs are concerned that in states where no standards have been adopted ILECs may

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31 *See Gulf Power*, 187 F.3d at 1337.

32 *Qwest Comments* at p. 11.

33 *SBC Comments* at p. 49.

and have implemented space reservation policies that allow them to reserve space for indefinite periods. As Mpower noted in its initial comments, Pacific Bell, prior to the implementation of a space reservation policy by the California Public Utilities Commission, had an "unlimited" reservation policy for dissimilar equipment, *i.e.*, switching equipment, Main Distribution Frames, and power.[34] In this proceeding, some ILECs advocate the reserving of space for some equipment for twenty years or more.[35]

CLECs are also concerned that some state commissions may accede to ILEC requests for unreasonably long reservation policies. In addition, a federal rule would eliminate a patchwork of different state requirements that could otherwise unduly complicate network planning by CLECs. A national standard will also help assure that ILEC practices of restricting the availability of collocation space will not lead to "inconsistent deployment of advanced services" throughout the U.S.[36]

Accordingly, the Commission should establish a national rule that forbids ILECs from reserving space for their own needs for periods longer than one year. This should operate as a

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34 *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Networks*, Decision 98-12-069, 1998 WL 995609, 69 (Ca. PUC 1998). Dissimilar equipment is equipment that will be deployed by the ILEC in the ILEC premises that will not be deployed by the CLEC. Similar equipment is equipment that both the ILEC and CLEC will likely deploy in an ILEC premises, *e.g.*, multiplexers.

35 *SBC Comments* at p. 52.

36 CC Docket No. 98-147, Reply to Oppositions to Sprint's Petition for Partial Reconsideration and/or Clarification at p. 9 (July 27, 1999) ("*Sprint Reply*").

ceiling that states could supplement with lesser periods.[37] This will provide certainty for both CLECs and ILECs while affording states the ability to adopt supplemental requirements that do not undercut the federal rule.

Mpower stresses that ILECs are operating under the fundamentally flawed premise that the states would be in a better position to evaluate space reservation needs than the Commission. ILECs have not established that there are any state-specific differences among ILEC central office equipment that would require disparate approaches in different states. Given that there is a national market for telecommunications equipment, switches and distribution frames will not vary significantly between ILECs. Further, the fact that the Commission has established national minimum collocation provisioning intervals indicates that the Commission can feasibly establish national space reservation policies.

B. The Standard Should Not Vary by Equipment

In their initial comments, some ILECs maintain that they need twenty years or more to plan for the orderly growth and expansion of equipment such as main distribution frames and switches and two years for equipment such as multiplexers and fiber optic terminals.[38] However,

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[37] The New York Department of Public Service does not oppose the FCC's approach of setting national standards in the absence of state standards. *The New York State Department of Public Service Comments* at p. 3 (October 11, 2000).

[38] *SBC Comments* at pp. 51-52. It defies belief that 20 years is a reasonable planning horizon for switches. Apart from the fact that technology is changing rapidly and that 20 year plans are likely to be obsolete as soon as they are crafted, SBC's statement in reality is little more than an attempt to arrogate to itself the ability to dictate the development of the network for the next 20 years under the guise of planning. The Commission should emphatically reject this attempt.

the record in this proceeding has undeniably demonstrated that telecommunications equipment is becoming smaller and more integrated. Switching, transport, and power equipment are being integrated in multi-functional equipment that occupies a fraction of the space needed before. The footprint of equipment is not expanding; it is contracting. Equipment that used to take up significant amounts of space, such as switches, and main distribution frames, is becoming smaller or marginalized.[39] In addition, with ILECs moving more of their network functionality out to remote terminals, the ILECs will be hard pressed to defend the need for reserving space for growth of equipment in the central office. As SBC has demonstrated through Project Pronto, ILECs can easily deploy new space as part of NGDLC systems, such as in remote terminals.

Accordingly, ILECs' claim that they need to reserve space for absurdly long periods of time is undercut by technical developments that have substantially reduced space pressures on central offices. Mpower submits that ILECs should not generally need to reserve space in central offices for their own use for more than one year.

III. THE COMMISSION SHOULD ASSURE THAT NEXT GENERATION NETWORKS SUPPORT COMPETITION

A. Some ILECs Want to Establish Next Generation Networks as a New Bottleneck for Provision of Advanced Services

ILECs paint the picture of a thriving advanced services market -- for ILECs. For instance,

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[39] For instance, SBC's Project Pronto architecture utilizes integrated DLC technology that bypasses the main distribution frame altogether. *Petitions of Covad Communications Company and Rhythms Links, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration on Certain Core Issues*, Illinois Commerce Commission Docket Nos. 00-0312 and 00-0313, (con't.)